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OFFICE OF LEGAL AFFAIRS

INTERNAL OPINION
IN-2010-2002

TO: Danilo Cardona, Director
David de la Tour, Program Counsel III
Office of Compliance & Enforcement

FROM: Mattie Cohan, Senior Assistant General Counsel

DATE: October 27, 2010

SUBJ: **Reservations of Rights in Pleadings – Compliance with 45 C.F.R. Parts 1609, 1617 and 1642 (MCLS CSR/CMS Review)**

CC: Lisa Melton, Program Counsel III, OCE
Lewis Goldstone, Program Analyst III, OCE

Questions Presented

The Office of Legal Affairs has been asked: (1) whether the inclusion of request for damages or a provision in a pleading by a recipient reserving the right for a potential private attorney to seek attorneys' fees at a later time necessarily means that the case is a "fee-generating" case for the purposes of Part 1609; (2) whether the inclusion of such a reservation of right to seek attorneys' fees violated the attorneys' fees restriction of Part 1642; and (3) whether the inclusion of a provision in a pleading by a recipient reserving the right for a potential private attorney to file at some later time for certification of the case as a class action violates the class action restriction in Part 1617.

Brief Answers

Neither the mere inclusion of request for damages nor the mere reservation of right to file attorneys' fees at some later time, by themselves, necessarily render a case a "fee-generating" case.

The inclusion of a reservation of right for a potential private attorney to file for attorneys' fees at some later time, was not a violation of the attorneys' fees restriction, particularly where, as here, the recipient made clear in the pleading that it was not making a claim for attorneys' fees and was legally prohibited from doing so.

The inclusion of a reservation of right for a potential private attorney to file for class action certification at some later time, was not a violation of the class action restriction, particularly where, as here, the recipient made clear in the pleading that it was not making a request for class action certification and was legally prohibited from doing so.

Background

This inquiry arises out of a CSR/CMS review by OCE of the Mississippi Center for Legal Services (MCLS). As we understand the facts, in the course of the review, OCE found that MCLS had filed a complaint on behalf of a number of clients, all of whom lived in the same mobile home park whose water service had been cut off by the City because of the failure of the property owner to pay the City for utility charges. In particular, we understand that:

> MCLS sued the City and the property owners ("Defendants") for injunctive and permanent relief. MCLS prayed that the Court order the City to restore water services to the residents pending resolution of this case, provide due process prior to terminating water service and condemning property, and grant reasonable accommodations for Plaintiffs' disabilities. Additionally, MCLS sued the Defendants for consequential and punitive damages for breach of contract and tortuous conversion. In their prayer for relief on June 16, 2009, the Plaintiffs requested that "Defendants and each of them be ordered to pay Plaintiffs their actual, consequential, and punitive damages as proven at trial found by the Trier of Fact.[sic]

Memo of July 27, 2010 from Lisa Melton, OCE Team Member to David de la Tour, OCE Team Leader, at 2. Further, we understand that the complaint filed in that case

> contained the following prayer for relief: "in the event Plaintiffs obtain private representation they request reasonable attorneys' fees, and – further- reserve the right to designate a class (Legal Service funded entities are not permitted to request attorneys fees or to file class actions)."

Id.

Analysis

Fee-Generating Cases under 45 C.F.R. Part 1609

Pursuant to section 1007(b)(1) of the LSC Act and implementing regulations at 45 C.F.R. Part 1609, LSC grant recipients may only take "fee-generating cases" under certain circumstances. The LSC Act contains no definition of the term "fee-generating case." The regulation defines "fee-generating case" as "any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds or from the opposing party." 45 C.F.R. §1609.2(a). This definition provides that the standard for what qualifies as a fee generating case is whether there is a reasonable expectation of the case resulting in the award of a fee.

The regulation does not provide expressly that the inclusion of a request for damages *by itself* is sufficient to form a reasonable basis upon which to determine that a case is a fee-generating case. Moreover, the preamble to the final rule notes (in connection with the explanation of another section of the rule):

> if the principal relief sought is equitable or a declaratory judgment, *inclusion of a prayer for damages would not turn the matter into a fee-generating case*. Similarly, if the recipient is representing the defendant in a case, the inclusion of a counterclaim for damages to protect the defendant's rights would not make the matter a fee-generating case.

62 Fed. Reg. 19398, at 19399 (April 21, 1997)(emphasis added). This makes it clear that the inclusion of a request for damages in a particular case is not, *in itself*, sufficient basis for determining that a case is a fee-generating case. This is because where the principal relief sought is declaratory or injunctive relief, a claim for damages, in itself, does not give rise to a reasonable expectation that fees will be awarded.

Similarly, the regulation does not provide expressly that the inclusion of a request for fees (or the reservation of a right for someone else to ask for fees), *in itself,* is sufficient to form a reasonable basis upon which to determine that a case is a fee-generating case. Moreover, in practice, the inclusion of a request for fees may have little bearing on the likelihood of actually being awarded fees in any particular case. As such, it appears that a "reasonable expectation" of a case resulting in the award of a fee cannot be formed by the mere inclusion of a request for fees, but rather requires the consideration of additional facts.

In light of this, and taking into account that inclusion in a pleading of a request for damages is not, in itself, necessarily indicative of case being a fee-generating case, it is the opinion of this office that the best reading of the regulation is that the inclusion of a request for fees, or the reservation of right to another attorney to request fees is not, *in itself*, necessarily determinative of the whether a case is a fee-generating case. Rather the inclusion of a request for fees, or the reservation of right to another attorney to do so, is a factor, along with others which must be considered on a case-by-case basis in deciding whether a particular case is a fee-generating case.

The information provided to us indicates that the recipient determined that the case was not a fee-generating case. The extent to which OCE questions the recipient's determination and/or makes its own determination as to whether the case was a fee-generating case (that is, whether there was a reasonable expectation that the case would generate fees) is a matter committed to OCE's discretion based on all of the totality of the circumstances. Further in this regard, §1609.6 requires recipients to "maintain records sufficient to document the recipient's compliance with this part." However, it may be worth noting that there is an apparent distinction made in the regulation between circumstances in which a recipient determined that a case is a fee-generating case but may, nonetheless, be undertaken by the recipient, and circumstancing in which a recipient has determined that a case is not fee-generating in the first place. The

regulation expressly requires a determination by the recipient's executive director (or designee) that one of the regulatory criteria in §1609.3(b)(3) has been met before the recipient may accept such a case *without attempted referral to the private bar*. Although the regulation does not expressly require that determination to be in writing, a written determination would appear to be a practical necessity. In contrast, the regulation does not contain a similar express requirement that the executive director make a particular determination that a particular case is not fee-generating. Accordingly, while such a determination must obviously be made at some point (if for no other reason to ascertain whether the case may be accepted without further procedural steps being taken) there may not be and the regulation would not appear to require an express determination in writing by the executive director that a case was not fee-generating, provided that the recipient has records that otherwise demonstrate compliance with the regulation.

Reservation of Right to Request Attorneys' Fees (Former 45 CFR Part 1642)

Although the restriction on claiming, collecting and retaining attorneys' fees has now been lifted, recipients remain accountable for violations of the restriction which occurred prior to December 16, 2009. LSC Program Letter 10-1 at 1. The complaint filed by the recipient at issue here was filed on June 16, 2009, while the statutory and regulatory ban on claiming attorneys' fees was still in effect. Accordingly, there is a question about whether the reservation of right for another attorney to request fees at some later point in time falls within the scope of the restricted activity.

When the attorneys' fees restriction was implemented, LSC issued guidance noting that attorneys who are co-counseling with a legal services program on a pro bono basis, were permitted to seek and recover fees for the portion of the work done by them. LSC Program Letter 97-1 at 1. The guidance went on to state that:

> recipient co-counsel should make clear that any claim for fees clearly notes that the claim is being requested on behalf of the uncompensated private co-counsel only, and that any award, order or payment of attorneys' fees should be payable directly to the private co-counsel.

Id. at 2. See also, OLA External Opinions EX-1996-06; EX-2002-1008. Guidance from this Office has further noted that:

> [t]o avoid any appearance that the recipient is claiming attorneys' fees, the pleadings should state unequivocally that the recipient attorney is not, and in fact *may* not, claim or collect and retain attorney's fees. Any such language should be as clear and straightforward as possible.
>
> > There may be multiple ways to draft such language; one example is as follows:

> Plaintiff demands an award of reasonable attorney's fees for <Name of Private Pro-Bono Attorney>, but makes no claim for any attorney's fees for <Name of Recipient Staff Attorney>, <Name of Recipient Program>, or any employee thereof.

> The pleadings could further specify, in a footnote or otherwise, that the recipient "is a recipient of funds from the Legal Services Corporation which prohibits recipients or their employees from claiming, collecting, or retaining attorneys' fees in any cases. 45 C.F.R. § 1642.3."

EX-2002-1008 at 3.

Thus, it is clear from the above, that the inclusion by a recipient of a claim for attorneys' fees for a private, uncompensated co-counsel did not run afoul of the attorneys' fees restriction on claiming attorneys' fees. In this instance, we note that there was no claim for attorneys' fees on anyone's behalf. Rather, there just a procedural reservation of a right for other counsel to make such a claim. Thus, arguably, the prohibition on claiming attorneys' fees is not implicated at all. Even, however, if the reservation of right is the equivalent of a actual claim for fees, to the extent that a recipient was permitted to include a claim on behalf of private co-counsel, we see no reason why this would not logically extend to a mere reservation of a right for some later counsel to do the same. As recommended in EX-2002-1008, in this case, the recipient made clear that it was not claiming fees for itself and was legally prohibited from doing so. Thus, it is the opinion of this office that the inclusion by MCLS of a reservation of right for a potential private attorney to file for attorneys' fees at some later time, was not a violation of the attorneys' fees restriction.

Reservation of Right to File for Class Action Status (45 CFR Part 1617)

Recipients are "prohibited from initiating or participating in any class action litigation." 45 CFR §1617.3. To address the question presented, we must address the scope of the terms "initiating or participating" and "class action." Taking these out of order, a "class action" is narrowly defined in 45 CFR §1617.2(a) as "a lawsuit filed as or declared by the court to be a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure (FRCP) or the comparable State statute or rule of civil procedure in which the action is filed." OLA Internal Opinion IN-2000-2014 (August 1, 2000) addresses the question as to what constitutes "class action litigation" and provides that:

> When this regulation was first instituted as an interim final rule, the preamble to that interim rule noted that:
>
> > The definition of "class action" refers to widely accepted Federal and local court rules and statutory definitions. Thus, a class action for the purposes of this part is a "class action" pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State

> statute or rule of civil procedure governing the action in the court where it is filed.
>
> Thus, if an action has not been filed as a class action, or later certified as one, then the suit is not a "class action" under the LSC statutes and regulations, regardless of the number of plaintiffs. . . . There is no indication in the legislative or regulatory history to suggest when Congress said "that initiates or participates in a class action suit" it meant to encompass every action involving either a group of plaintiffs or unknown parties (whether or not those persons may later turn out to be plaintiffs).

Turning to the meaning of "initiating or participating," the preamble to the final rule provides that in a case "where the recipient files or otherwise initiates action to have the case certified as a class action, participation in the case is prohibited from the point that the recipient takes such actions." 61 Fed. Reg. 63754, 63755 (December 2, 1996). Under the instruction, "initiating" would appear to include actual filing for certification as a class as well as taking other action to have the "case certified as a class." The preamble contains no further explication as to what such actions might be, not has this Office had occasion to opine on what might be included. We, therefore, consider now whether a reservation of right for someone else to later file constitutes taking an action to "otherwise" initiate having the case certified as a class action.

MCLS did not include in its complaint any request to file the suit as a class action or have the group of plaintiffs certified as a class pursuant to Rule 23 of the FRCP. Nor was the case certified as a class action under that Rule. In fact, MCLS specifically noted in their pleading that MCLS was legally precluded from filing for class action certification. As for the reservation of a potential right to later file as a class action, it appears that such an action has no legal meaning under Rule 23. That is, there is no provision in Rule 23 that requires a litigant to include a reservation of right to later file for class certification in a complaint or risk losing the procedural ability to so file later and is not itself a basis for the court to certify a class or have the case proceed as a class action suit. Thus, there is no potential argument that the inclusion of such a reservation could be interpreted as something that "otherwise initiates action to have the case certified as a class action."[1] It is, accordingly, the opinion of this office that MCLS' inclusion of a reservation of right for later private attorney to seek certification of a class in the litigation did not violate the prohibition on initiating or participating in class action litigation pursuant to 45 CFR Part 1617.

We hope that this information addresses all of your questions in this matter. Please let us know if we can be of any further assistance.

[1] This Office is not rendering an opinion on whether such a reservation of right, if required by Rule 23, would rise to the level of "initiating or participating" in a class action.